Mehta, Sandeep

From: Philip Moffat <pmoffat@verdantlaw.com>
Sent: Friday, July 31, 2020 2:26 PM
To: Peterson, Mary
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Subject: Vogel Paint & Wax Company Superfund Site - Draft EPA Supplemental Memorandum to the Fifth Five-Year Review Report
Attachments: 2020-07-31 Vogel Concerns w EPA Draft Memo re 5th 5-Year Review Report.pdf

Dear Ms. Peterson –

Attached are comments from Vogel Paint & Wax Company regarding the Agency's "Draft EPA Supplemental Memorandum to the Fifth Five-Year Review Report" for the site. Vogel appreciates EPA's willingness to "clear up the record" memorialized in Fifth Five-Year Review Report. However, the company remains concerned about the discrepancies between the Report and the lengthy administrative record for the site, including the 2000 ESD. Of particular concern is that the supplemental memorandum fails to address the company's objections to including the discussion about the point of compliance for the site. And the company is also concerned about the language of the protectiveness statement for the groundwater Operable Unit.

The company is committed to ensuring that this site remains protective of human health and the environment. However, presently there is a great deal of uncertainty and unpredictability regarding the process for getting the site cleaned, closed, and delisted. As EPA knows, this is one of the company's key objectives for doing the Pilot Study.

We look forward to receiving a revised draft of the supplemental memo from your staff. And we would welcome the opportunity to further discuss these issues with you and your staff in the near future.

I look forward to your response.

Best regards,

Philip A. Moffat

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July 31, 2020

VIA ELECTRONIC MAIL
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Re: Draft EPA Supplemental Memorandum to the Fifth Five-Year Review Report
Vogel Paint & Wax Company Superfund Site, Maurice, Sioux County, Iowa, EPA ID IAD980630487

Dear Ms. Peterson:

Vogel Paint & Wax Company ("Vogel" or "the company") appreciates EPA's willingness to "clear up the record" memorialized in Fifth Five-Year Review Report ("FYR") for the Vogel Paint & Wax Company Superfund Site ("Site"). We also acknowledge the Agency's efforts to meet with us in February, to undertake the Supplemental Memorandum to the FYR ("supplemental memo"), and to provide the opportunity to submit comments on the document. The corrections to the record made in the June 15 draft supplemental memo are welcome. We also welcome the collaborative attitude of your staff in our recent communications with them. However, we remain concerned about the discrepancies between the FYR and the lengthy administrative record for the Site, including the 2000 ESD. Of particular concern is that the supplemental memo failed to address our objections to including the discussion about the point of compliance for the Site in the FYR. And we also are concerned about the language of the protectiveness statement for the groundwater Operable Unit ("OU"). Our concerns are detailed below. Lastly, we appreciate the commitment of your staff to resolve these issues before the final supplemental memo is issued and added to the administrative record.

Point of Compliance for Groundwater

In 2000, EPA and IDNR set the point of compliance for groundwater at the Site's property boundary. This was done by the process of issuing an Explanation of Significant Differences ("ESD"). The ESD recognized that compliance with the ARARs for groundwater at all locations across the Site was not reasonable. Specifically, the document states:

> In the more than a decade of time that has elapsed since the original ROD, it has become apparent that such a goal is not reasonable. Despite the removal of over a million pounds of source material that has been completed by the soil clean-up actions, groundwater contaminant levels have remained fairly stable. The additional free-product removal described in this ESD is expected to eliminate the bulk of the remaining source material. Even with that, localized groundwater contamination in excess of ARARs is anticipated to exist for the foreseeable future.
>
> The remedial action objective (RAO) for groundwater prescribed in the ROD is to reduce contaminants in groundwater to established health-based standards for drinking water. This ESD clarifies this RAO by specifying *where* health-based standards must be achieved. With institutional controls applicable to the site property, the use of on-site groundwater for drinking water will be prohibited. However, the potential exists for contaminants migrating off-site to enter a drinking-water supply, even if such a water supply does not currently exist. By ensuring that groundwater does not leave the site with contaminants at levels in excess of drinking-water standards, off-site exposure to contaminants from the site in groundwater at concentrations in excess of health-based standards will not be possible. Therefore, the site property boundary is being designated as the point of compliance for groundwater ARARs.
>
> *(Emphasis added.)*

This understanding of how the Site would be remedied remained for nearly 20 years through the scrutiny of three Five-Year Reviews. It was not until the 2019 FYR that anyone questioned the protectiveness of the 2000 decision. EPA did not raise their concerns with Vogel directly. Instead, the Agency added language to the draft FYR – a draft that the Agency failed to share with Vogel – that questioned the remedy with only a general reference to a guidance document published in 2009:

> However, the point of compliance for the RAO for the groundwater as defined in the October 2000 ESDs document is not consistent with the EPA guidance, "Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, June 26, 2009, OSWER Directive 9283.1-33". The successful completion of the Pilot Study, should it be fully implemented, would provide information needed to evaluate the current remedy effectiveness and whether a change to the remedy is necessary. As a part of the evaluation of the remedy effectiveness, evaluation of the RAOs for cleanup of the groundwater should also be addressed.

We contend that this statement mischaracterizes the "Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, June 26, 2009, OSWER Directive 9283.1-33" ("2009 Guidance"). The guidance document does not appear to create any new CERCLA polices. It merely restates existing policies. A careful review of the 2009 Guidance document is instructive. The 2009 Guidance does not require that sites meet

ARARs everywhere at a site. It does not prohibit setting the point of compliance at a site boundary. The 2009 Guidance explains that CERCLA response actions for groundwater should address all pathways of exposures that pose an actual or potential risk to human health and the environment. Furthermore, the 2009 Guidance acknowledges that restoration of groundwater to beneficial uses may not be practicable.

The 2009 Guidance specifically states that:

> … remedial action shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act and water quality criteria established under section 304 or 303 of the Clean Water Act, where such goals or criteria are relevant and appropriate under the circumstances of the release or potential release.
>
> (*Emphasis added.*)

That:

> Consistent with CERCLA and the NCP, Superfund response actions protect human health and the environment in a number of ways … To ensure protective remedies, CERCLA response actions that clean up contaminated groundwater generally address all pathways of exposures that pose an actual or potential risk to human health and the environment.
>
> (*Emphasis added.*)

That:

> The NCP establishes general expectations for purposes of groundwater restoration as follows:
>
> EPA expects to return usable ground waters to their beneficial uses wherever practicable, within a timeframe that is reasonable given the particular circumstances of the site. When restoration of groundwater to beneficial uses is not practicable, EPA expects to prevent further migration of the plume, prevent exposure to the contaminated ground water, and evaluate further risk reduction.
>
> (*Emphasis added.*)

The 2009 Guidance also validates use of the point of compliance concept. Specifically, the document notes that "[t]he NCP preamble uses both 'area of attainment' and 'point of compliance' in discussing where groundwater cleanup levels are to be achieved. The area of attainment/point of compliance is important in the overall framework of developing and implementing cleanup of a contaminated aquifer." (*Emphasis added.*)

In direct contradiction to what EPA has said in the FYR, the 2000 ESD is entirely consistent with this guidance document. The 2009 Guidance notes that the statute itself limits the requirement to attain MCLs to "where such goals or criteria are relevant and appropriate under the circumstances of the release or potential release." (*Emphasis added.*) With this Site, there is no exposure to groundwater on the Site and the nature of the contamination and the hydrogeology make it impracticable to meet the MCLs everywhere.

On-site exposure to contaminated groundwater will not occur. Specifically, the 2000 ESD states that "[w]ith institutional controls applicable to the site property, the use of on-site groundwater for drinking water will be prohibited." Institutional controls have been in place since 1984. The Site is listed on the Iowa Registry of Hazardous Waste or Hazardous Substance Disposal Sites. That was the form of institutional control that was prescribed in the ROD. This means that any sale or significant change in use of the property must be approved by IDNR. EPA's draft supplemental memo acknowledges that "[t]he Site's current IC is, therefore, clearly enforceable and functioning as intended."

Off-site exposure to contaminated groundwater will not occur either. By ensuring compliance with the ARARs at the property boundary, groundwater would not leave the Site with contaminants at levels in excess of drinking-water standards that would present off-site exposure to contaminants. Therefore, the 2000 ESD does manage all pathways of exposure to the contaminated groundwater that "pose an actual or potential risk to human health and the environment."

With the ESD, EPA and IDNR have definitively acknowledged, and documented and supported with the record, that "restoration of groundwater [throughout the site] to beneficial uses is not practicable." (*Emphasis added.*) That conclusion had been reached with over a decade of pump and treat remediation at the time the ESD was signed. Two decades of continued remediation efforts have only further established that restoration of groundwater throughout the site to beneficial uses is not practicable.

Thus, the 2000 ESD decision to meet the ARARs at the property boundary as set in the 2000 ESD is entirely consistent with the 2009 Guidance document – and the NCP and the statute. Assertions to the contrary in the FYR are erroneous. Therefore, the language at issue should be stricken from the FYR.

Sections 5.2, 5.2.5, and 6.1 need to be revised. The language at issue is as follows:

- Section 5.2: RAOs and specifically point of compliance are not consistent with the EPA groundwater guidance and will need to be revised/clarified before site completion.
- Section 5.2.5: However, the point of compliance for the RAO for the groundwater as defined in the October 2000 ESDs document is not consistent with the EPA guidance, "Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration, June 26, 2009, OSWER Directive 9283.1-33".

- Section 6.1: The point of compliance defined in the October 2000 ESD appears to be inconsistent with Iowa's state-wide classification of drinking water aquifers and the EPA's expectation to return groundwater to beneficial uses wherever practicable. This issue needs to be further evaluated between the EPA, IDNR, and Vogel.

Despite EPA's assertion at the February 2020 meeting that "the Agency is here to help you navigate the process," the path towards closure and delisting of the Site remains opaque. It is unclear why EPA thinks it needs to revisit a decision that was made twenty years ago, a decision that has been reaffirmed in every Five-Year Review since then until now. It has been established, and the record demonstrates, that it is impracticable to return groundwater everywhere throughout the Site to beneficial uses; that is, it is impracticable to meet the ARARs for groundwater everywhere throughout the Site. The administrative record for the Site complies with the requirements of CERCLA §117(c) and §300.435(c)(2)(i) of the NCP. IDNR issued the 2000 ESD – with which EPA concurred – to clarify the RAO prescribed by the ROD; *i.e.*, to specify where health-based standards must be achieved and when remediation can be discontinued.

To date, EPA has failed to provide an explanation consistent with the NCP and EPA policies for why the Agency wants to change the point of compliance. Its statements about the point of compliance seem unrelated to the administrative record for the Site. And its statements about the 2009 Guidance upon which it is relying seem misguided. Similarly, EPA has not adequately justified why additional decision documents and other procedures might be necessary to delist the Site. The Agency has not set out a clear pathway towards site closure and delisting; one that is consistent with the administrative record. If the Agency thinks that additional procedural measures are necessary, it should explain why this is the case, based on the administrative record and the requirements of CERCLA and the NCP. Even if the approach that IDNR and Region 7 took with the 2000 ESD is not the approach that the Agency would take today, it does not make the 2000 ESD inconsistent with the statute and the regulations. On September 27, 2000, EPA's Jim Colbert documented the Agency's determination that an ESD was an appropriate approach to address modifications and provide clarifications to the ROD's plan for groundwater remediation at the Site.[1] The Agency has identified no credible basis for undoing that decision twenty years after the fact.

Protectiveness Statement for OU2

Two corrections are needed to the Protectiveness Statement for OU2. At issue are the Statement's discussion of institutional controls and groundwater contaminants.

Institutional controls. We appreciate that the draft supplemental memo acknowledges that "[t]he Site's current IC is, therefore, clearly enforceable and functioning as intended." However, the supplemental memo still needs to address why a redundant institutional control – in the form of an environmental covenant – is necessary. The FYR noted that the 2000 ESD "[r]eplaced the state registry of Hazardous Waste or Hazardous Substance Disposal Sites as an

[1] Jim Colbert September 27, 2000 email to IDNR's Bob Drustrup regarding the appropriateness of an ESD approach.

institutional control with an environmental protection easement ["EPE"]." That statement is not correct. The 2000 ESD actually states that "[t]he DNR now accepts the EPE in lieu of a registry listing and an EPE may be used in addition to (or in lieu of) the registry listing. An EPE would enable more specific restrictions on land use to be made." (Emphasis added.) Thus the 2000 ESD does not require redundancy; instead, it allowed for one institutional control or the other. Although the draft supplemental memo "[c]larifies EPA's comment concerning the enforceability of existing institutional controls," it fails to explain why the Agency "recommend[s] an additional layer of enforceable ICs, such as an environmental covenant." Requiring a redundant institutional control merely to serve as an "additional layer" of protection without justification seems arbitrary and therefore it should be removed.[2]

Groundwater contaminants. The draft supplemental memo proposes changing the language of the Protectiveness Statement for OU2 to include the statement that "[t]hese efforts should also address removal of the remaining source area contaminants from the groundwater." This language is unclear. It is susceptible to multiple interpretations which are inconsistent with the Site history and current status.[3] Therefore it leads to confusion. The language of the protectiveness statement should be changed to read "Where necessary to have good control over the residual contamination at the Site and to prevent future off-site migration, these efforts should include further reduction of contaminant concentrations in groundwater within the former source area."

Additional Correction

The language of the first two sentences of section 4.2.1 is imprecise. Please replace the existing language with the following text:

> Free product has been present in MW-4R (Appendix G, Figure 1) during most of the Five-Year review period. Measurable free product ranged in thickness of 0.02 to 0.50 foot between January 2018 and February 2019. Free product has not been measurable in MW-4R since February 27, 2019 through the end of the Five-Year review period (September 2019), confirmed by weekly measuring events.

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[2] Vogel might consider taking this redundant measure if it were necessary to preserve the current point of compliance and move the Site towards closure and delisting.

[3] The groundwater contamination is well characterized. It is stable. And as the record establishes, it is impracticable to achieve substantial further reductions in contaminant levels. In addition, as the record documents, a great deal of effort has been undertaken thus far to remediate the contamination at the Site. Moreover, there are no new source areas from which contamination could migrate. As the supplemental memo correctly notes "The OU-01 remedy is protective of human health and the environment." Soil remediation was completed in May of 1999. A Remedial Action Report certifying the completion of soil remediation was issued in September of 2000.

Vogel has invested millions of dollars in remediating the contamination at the Site. The 2019 Pilot Study is yet another significant investment. The company is committed to ensuring that this Site remains protective of human health and the environment. However, presently there is a great deal of uncertainty and unpredictability regarding the process for getting the Site cleaned, closed, and delisted (which, as EPA knows, is one of the company's key objectives for doing the Pilot Study). The Agency's recent statements regarding the point of compliance suggest that EPA is moving the goalpost after decades of work by the company to remediate and delist the Site. EPA needs to explain what it is that the Agency wants the company to do, why it is that the Agency thinks doing so is necessary, and the legal and factual basis underpinning the Agency's decisions.

We look forward to receiving a revised draft of the supplemental memo from your staff. And we would welcome the opportunity to further discuss these issues with you and your staff in the near future.

Sincerely,

Philip A. Moffat

cc: Susan Fisher, EPA Region 7 Federal Facilities and Post Construction Section Branch Chief
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